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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 515

LOUIS KAYE,

Petitioner,

—v.—

CO-ORDINATING COMMITTEE ON DISCIPLINE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE NEW YORK COUNTY LAWYERS' ASSOCIATION, AND BRONX COUNTY BAR ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENTS' BRIEF IN OPPOSITION

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Statement of the Case

This is a petition for a writ of certiorari to review the order of the Court of Appeals of the State of New York entered on June 14, 1968, affirming the order of the Supreme Court of the State of New York, Appellate Division, First Department ("the Appellate Division"), dated December 5, 1967, disbarring petitioner from the practice of law.

The original disciplinary proceeding against petitioner, was brought pursuant to Judiciary Law, §90(2). On January 13, 1966, the petitioner was disbarred by order of the Appellate Division upon a finding that charges preferred against him by respondents, members of the Co-ordinating Committee on Discipline ("the Committee"), had been sustained. *Matter of Kaye,* 24 A. D. 2d 345. The evidence relied upon by the Appellate Division consisted of documents which petitioner had produced pursuant to subpoena, his testimony before the Committee in the course of its preliminary inquiry, and independent evidence adduced by respondents without reliance upon any documents made available by petitioner or testimony given by him.

Soon after entry of the order of disbarment of January 13, 1966, petitioner moved for leave to appeal to the Court of Appeals and for a stay, contending that the introduction before the Referee of his testimony adduced in the course of the Committee's preliminary investigation, was a violation of his rights under the Fifth Amendment. Petitioner further contended that respondents' investigation had its genesis in certain papers and records which were allegedly stolen from his apartment in violation of his Fourth Amendment rights. Petitioner's motions for leave to appeal and a stay were respectively denied by the Court of Appeals, 17 N. Y. 2d 422 and 17 N. Y. 2d 731. Thereafter, this Court vacated the order of disbarment and remanded the case "for reconsideration in the light of *Spevack* v. *Klein,* 385 U. S. 511." *Kaye* v. *Co-ordinating Committee,* 386 U. S. 17.

Pursuant to the Supreme Court's mandate of March 10, 1967, respondents moved in the Appellate Division for an order sustaining certain of the charges against petitioner

upon a re-examination of that portion of the trial record not affected by the *Spevack* decision. Respondents urged that the Appellate Division review the record to determine whether there was independent evidence sufficient to sustain the charges, without reliance upon petitioner's testimony and documents produced by him pursuant to subpoena. Petitioner served respondents with a notice of cross-motion which sought, among other forms of relief, an order directing respondents to "strictly comply with the [Supreme Court] mandate issued on March 10, 1967" and for an order of "re-reference to hear this matter *de novo*."

By order of December 5, 1967, the Appellate Division disbarred petitioner, its companion opinion noting: "Examination of the record reveals that there is sufficient [evidence] without respondent's testimony to sustain charges 1, 2, 3 as modified by eliminating the Finegold specification, 4, 5, 6, 8 and 9." On June 14, 1968, the Court of Appeals affirmed the Appellate Division's order of December 5, 1967.

ARGUMENT

I.

Petitioner was accorded his full rights under the Fifth Amendment.

(a) ***The charges of misconduct are sustained by evidence independent of petitioner's testimony and documents produced by him.***

The petitioner contends that he was denied the protection of the Fifth Amendment in the disciplinary proceedings below. The record before this Court does not support this assertion. The order of disbarment which was entered on December 5, 1967 resulted from a reconsideration of the evidence of petitioner's misconduct without reliance upon his testimony and documents produced by him in the course of respondents' inquiry.

Petitioner chooses to ignore the massive evidence of his professional misconduct—evidence which is in no way dependent upon his previous cooperation with the Committee. As an example, the following independent evidence fully supports three of the charges sustained by the Court:

(1) Petitioner was found to have "farmed out" his negligence cases to other attorneys without regard to the Canons of Professional Ethics and the Special Rules of the Appellate Division. In support of this charge, respondents adduced the testimony of five attorneys with whom petitioner negotiated these case-forwarding, cash transactions, together with the testimony of petitioner's general office employees.

(2) The conversion of a client's funds is sustained by the testimony of the client herself.

(3) Petitioner's harboring a disbarred lawyer in his law office is clearly proved by the testimony of the ex-attorney and petitioner's former secretary.

The Appellate Division was thus able to discipline petitioner without reaching any constitutional issues. Contrary to petitioner's theory, the Court below found that the record herein was not completely permeated by the "taint of . . . coerced evidence," but rather that the constitutional issues were separable from the independent grounds for disbarment. Accordingly the order which struck petitioner's name from the roll of attorneys was entered without reliance upon questionable evidence. This then is the meaning of the Appellate Division's statement that the constitutional principles "had no controlling application."

In addition, petitioner urges that by sustaining the Referee's report, the Appellate Division acted in violation of his constitutional rights. Put in its proper perspective, this argument is nothing more than a technical ploy totally without merit. It is obvious from the language of its opinion and from the record before this Court, that the Appellate Division, in confirming the Referee's *ultimate finding* that charges had been sustained, did not rely upon those portions of the record affected by the *Spevack* decision and violative of petitioner's rights under the Fifth Amendment.

(b) *Petitioner's attempt to redefine and extend the scope of the Fifth Amendment is invalid.*

Petitioner, aware of the wealth of evidence adduced against him through the testimony of others, goes on to attack the nature of a disciplinary proceeding vis-à-vis the protection afforded by the Fifth Amendment. The Fifth

Amendment to the Constitution of the United States provides in part that "no person . . . shall be compelled in any criminal case to be a witness against himself." Petitioner argues for an expansion of the term "criminal case" as used in the Fifth Amendment to include disciplinary proceedings. There is no merit in his contention and the authority which he cites to support his argument in no way warrants the conclusion he thrusts upon this Court.

An analysis of *Spevack* v. *Klein, supra,* makes it very clear that this Court did not change the law defining the scope of disclosure against which the privilege protects. Indeed, the language of the majority opinion in *Spevack* discloses no intent on the Court's part to expand the privilege to include disciplinary proceedings. When Mr. Justice Douglas stated: "The threat of disbarment and the loss of professional standing, professional reputation, and of livelihood, are powerful forms of compulsion to make a lawyer relinquish the privilege," he was speaking in the conventional sense of the constitutional privilege against self incrimination.

Obviously, then, the Supreme Court did not reverse the order of disbarment in *Spevack* because the attorney had the right to refuse to answer questions which might tend to subject him to professional discipline. Such questions are clearly outside the scope of the privilege. Rather, the Court based its reversal upon a finding that disbarment was an improper form of compulsion to force the attorney to abandon his right not to answer questions which might tend to incriminate him in the conventional sense, that is, subject him to criminal prosecution.

In the context of petitioner's contention, the nature of a disciplinary proceeding is nowhere stated more clearly

than in *Matter of Rouss*, 221 N. Y. 81, in which Judge Cardozo spoke for a unanimous New York State Court of Appeals:

> A proceeding looking to disbarment is not a criminal case. We do not suggest that the witness is protected by the Constitution only when testifying in the criminal courts. The law is settled to the contrary. But to bring him within the protection of the Constitution, the disclosure asked of him must expose him to punishment for crime . . .

The *Spevack* holding is directed solely to the *type of proceeding* in which the privilege protects against self-incriminating disclosures; it does not alter or expand the type of disclosure which is protected against. This distinction, implicit in *Spevack*, is made explicit in *Application of Gault*, 387 U. S. 1:

> . . . the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites.

Justice Fortas, writing for the majority in *Gault*, then goes on to adopt the precise language in which the scope of the privilege was defined in Justice White's concurring opinion in *Murphy* v. *Waterfront Commission*, 378 U. S. 52:

> . . . it protects any disclosures which the witness may reasonably apprehend could be used in a *criminal prosecution* or which could lead to other evidence that might be so used. [278 U. S. at 94, quoted with approval, 87 S. Ct. at 1454 (emphasis supplied)].

Nor can petitioner rely upon a related case, *Garrity* v. *New Jersey*, 385 U. S. 493, decided on the same day as *Spevack*. In *Garrity*, the Court prohibited the use of testimony by the prosecution at a *criminal trial* acquired by compulsion of threat of loss of job upon refusal to answer for any reason. The Court concluded that the testimony elicited and sought to be used in support of criminal charges against the defendants had been improperly compelled. Thus it can readily be seen that the Court was not expanding the scope of the privilege but rather addressed itself to the effect of state conduct as constituting improper compulsion exerted upon an individual in order to force him to waive his existing privilege against self-incrimination in the *conventional sense*.

Petitioner's reliance upon *Boyd* v. *United States*, 116 U. S. 616 and *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693 is equally misplaced. As this Court noted in *Plymouth Sedan*, the *Boyd* situation required a determination that the criminal law had been violated, the forfeiture there sought being authorized as an alternative to imprisonment and/or fine in the same statute. Consequently, if the claimant there were compelled to give testimony, he would be asked to provide evidence to establish a violation of what this Court concluded was essentially a criminal statute.

This Court has held that disciplinary proceedings are civil rather than criminal in nature, *Ex Parte Wall*, 107 U. S. 265, 288. Its rules concerning the discipline of attorneys admitted to its Bar have been predicated upon that assumption. Thus, where it is shown to this Court that any member of its Bar has been guilty of misconduct, he is forthwith suspended from practice and thereupon offered

the opportunity to show good cause why he should not be disbarred (Revised Rule 8). Contrary to the procedure applicable to criminal cases, the "accused" is thereby required to come forward to explain his conduct.

The opinion of the Court of Appeals of the State of New York is particularly significant in *Matter of Zuckerman*, 20 N. Y. 2d 430, 438-439, cert. denied, 390 U. S. 925 (after respondents were disciplined upon remand for reconsideration in the light of *Spevack*):

> The evidence which these appellants produced before the Referee cannot be used against them in any criminal proceeding. They had no privilege against making disclosure usable only in a disciplinary proceeding. The constitutional privilege applies only in the case of evidence which might be used against them in a criminal case under the language of the Fifth Amendment. Haber and Zuckerman may have thought that unless they produced this evidence they would be disbarred under *Cohen* v. *Hurley*, but neither [*Garrity* v. *New Jersey*, 385 U. S. 493 (1967)] nor *Spevack* confers upon them a constitutional privilege to withhold evidence which cannot lead to criminal prosecution and bears only upon their right to continue to practice law.

Two recent cases make petitioner's position even more untenable. In *Gardner* v. *Broderick*, 392 U. S. 273 and *Uniformed Sanitation Men Association, Inc.* v. *Commissioner of Sanitation*, 392 U. S. 280, the Court made it clear that appellants could have been dismissed from their public positions for failure to answer questions relating to performance of their official duties so long as they were not required to relinquish the protection afforded to them under the Fifth Amendment.

Adoption of petitioner's contention that disciplinary proceedings are criminal in nature could lead to intolerable situations within the framework of the Bar's traditional self-policing machinery. An analysis of *Matter of Rouss, supra,* points up the problem. In that case, Rouss, an attorney, had been called as a witness in the criminal trial of another, during which he was granted statutory immunity. Thereafter, the testimony given under immunity from criminal prosecution was introduced in a disciplinary proceeding. Upon disbarment, Rouss appealed, urging that the immunity from prosecution he acquired by testifying barred the use of his testimony not only in a criminal case, but in a disciplinary proceeding as well.

Adoption of Rouss' contention, as well as that of petitioner herein, would mean that a grant of immunity to an attorney in a criminal prosecution would deprive the Appellate Division of its right to supervise and regulate the conduct of lawyers. Thus, for example, an attorney who admitted giving bribes to a state official might continue to practice law before the very agency whom he sought to corrupt. A result as preposterous as this finds no support in the Constitution nor in this Court's opinion. Indeed, this Court has refused to entertain the notion that a disciplinary proceeding falls within the meaning of "a criminal case" for purposes of Fifth Amendment application. *Kaufman* v. *The Association of the Bar of the City of New York,* 25 A. D. 2d 48, cert. denied, 389 U. S. 1048; *Ungar* v. *The Association of the Bar of the City of New York,* 27 A. D. 2d 925, cert. denied, 385 U. S. 1006.

Respondents respectfully urge that the adoption of petitioner's proposed interpretation of the Fifth Amendment would lead to a condition never intended by the authors

of the Constitution and so well phrased by Judge Cardozo in *Matter of Rouss, supra*:

> Consequences cannot alter statutes, but may help to fix their meaning. Statutes must be so construed, if possible, that absurdity and mischief may be avoided. The claim of immunity from disbarment cannot survive the application of that test. If the exemption protects lawyers, it must equally protect physicians, whose licenses have long been subject to revocation for misconduct (citing statutes and cases). Two great and honorable professions have in that view been denied the right to purify their membership and vindicate their honor. The charlatan and rogue may assume to heal the sick. The knave and criminal may pose as a minister of justice. Such things cannot have been intended, and will not be allowed.

II.

Petitioner's Fourth Amendment rights were not violated.

The disciplinary inquiry below was initiated as a result of a complaint received by the Grievance Committee of the Association of the Bar of the City of New York from one Abraham Gelman, an attorney formerly associated with petitioner. Upon review of the complaint forwarded to respondents by the Grievance Committee, it was decided that the matter warranted further investigation. Accordingly, respondents began a review of petitioner's personal injury practice with a view to determining how petitioner obtained retainers in negligence actions, how such claims were prosecuted and in what manner settlement monies were distributed.

In the course of their investigation, respondents questioned 15 witnesses, including 7 attorneys who had dealt with petitioner on prior occasions. The remaining 8 witnesses included former clients of petitioner. During these preliminary hearings, the files of the attorney-witnesses and of various insurance companies were marked for identification together with copies of statements of retainer and closing statements filed with the Judicial Conference of the State of New York. This is the evidence which respondents produced in support of their application for the imposition of discipline upon petitioner, and which resulted in the Appellate Division's order of December 5, 1967.

At the outset, petitioner charged that the disciplinary inquiry was based upon information obtained from his files. The record before this Court disproves petitioner's contention. Rather than submit proof to support his allegation that the Committee was the beneficiary of stolen records, petitioner has contented himself with a constant reiteration of the charge, unsupported by any evidence whatsoever. The courts below have found no merit in this irrelevant issue, manufactured only to becloud a legitimate inquiry into petitioner's professional fitness.

On his first appeal to this Court, petitioner urged two principal theories, both of which he renews in the instant application: his rights under the Fifth Amendment were violated; and he was the victim of an "unlawful search and seizure" violative of his Fourth Amendment rights. In vacating the Appellate Division's first order of disbarment, this Court relied on the *Spevack* doctrine, which is based entirely on Fifth Amendment considerations. It is absurd to urge—as petitioner's logical position must be here—that the Supreme Court remanded for reconsideration in the light of *Spevack* if this same Court was per-

snaded that the Committee had based its case upon tainted evidence which would necessarily and ultimately require a dismissal of the entire proceeding. Thus, in reversing on Fifth Amendment grounds, this Court implicitly held that no Fourth Amendment right was violated.

Assuming, *arguendo,* that petitioner's files were stolen by a former associate of his, the Committee's use of such files would not have been improper. In *Burdeau* v. *McDowell,* 256 U. S. 465, this Court held that the government had a right to use stolen documents as evidence in a criminal prosecution against their owner. In reaching this conclusion the Court stated:

> The Fourth Amendment gives protection against unlawful searches and seizures, and . . . its protection applies to governmental action . . . it was intended as a restraint upon the activities of sovereign authority and was not intended to be a limitation upon other than governmental agencies; as against such authority it was the purpose of the Fourth Amendment to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property, subject to the right of seizure by process duly issued.

In New York, it has long been settled that the constitutional and statutory prohibitions against unlawful searches and seizures require the exclusion of evidence unlawfully gathered by state officers only. In both civil and criminal prosecutions, it has been held that the Fourth Amendment protections have not been applied where information had been wrongfully obtained by private individuals as distinguished from government officers and agents. *Sackler* v. *Sackler,* 15 N. Y. 2d 40; *People* v. *Horman,* Court of

Appeals of the State of New York, decided July 1, 1968, New York Law Journal, 9/18/68, p. 1.

Neither *Elkins* v. *United States*, 364 U. S. 206, nor *Mapp* v. *Ohio*, 367 U. S. 643, disturb the *Burdeau* doctrine. In *Elkins*, evidence was excluded in a criminal case since it was the product of an unlawful seizure by state officers and thus was found to be inadmissible in a federal court by virtue of violations of both the Fourth and Fourteenth Amendments. *Mapp* held that state courts must also exclude evidence seized in violation of the Federal Constitution, i.e., by state officials rather than private citizens.

By any standard, petitioner's argument must fail. He has not only failed to prove that the evidence in this case was unlawfully seized with the participation or knowledge of any governmental official. He has also failed to prove the fact of an unlawful seizure.

III.

Petitioner was not deprived of his rights under the due process clause of the Fourteenth Amendment.

This third ground upon which petitioner seeks certiorari is no more than a reiteration of his first two contentions based upon the Fourth and Fifth Amendments. Standing alone, neither petitioner's self-incrimination argument nor his search and seizure theory has sufficient merit to warrant this Court's review and they gain no merit by their combination.

Contrary to petitioner's assertion, the allegations of "extortion" and "stolen documents" are not issues here, since no evidence was adduced to support either charge. The

circumstances leading to the initiation of the disciplinary inquiry have been recited in detail (II, *supra*).

There was nothing perfunctory about the manner in which the Appellate Division reconsidered the evidence. The Committee moved to sustain the charges against petitioner and to impose discipline on the basis of a re-examination of that portion of the record not affected by *Spevack*. Therefore, it cannot be argued successfully that testimony elicited from petitioner was used in the Appellate Division's recon deration of the case after remand, since, in concluding that a second disbarment order should issue, the Court below disregarded all evidence, both testimonial and documentary, supplied by petitioner.

Petitioner's posture throughout the proceedings below makes his argument that he was entitled to a new trial on remand, preposterous on its face. Having successfully contended in this Court that his rights under the Fifth Amendment were violated by the use of his testimony earlier in the proceedings, he now seeks a hearing "which would permit complete eradication of the contamination of the prior proceedings" (p. 17, Pet. Brief). It must be assumed that he would testify at such a hearing although he does not express his intention in the present application. (Below, petitioner sought an opportunity to testify so that he might rectify "his poorly advised refusal to testify before the Referee."). The privilege against self-incrimination is one which cannot be so casually turned on and off. If petitioner's hearing *de novo* were to be realized, he would either return and give the same testimony which he originally gave, thus making the second trial a meaningless charade; or he would give different and necessarily perjured testimony.

Petitioner's assertion that the proceedings below violated the fundamental fairness requirement of the Fourteenth Amendment is without merit. Measured by this Court's standard as set forth in *Matter of Ruffalo*, 390 U. S. 544, it is obvious that petitioner was never denied his right to procedural due process. He was given written notice of the investigation and was served with a petition which detailed each charge and specification. He was represented by counsel throughout, confronted the witnesses who testified on respondents' behalf, and cross examined these witnesses vigorously. Thus he had ample opportunity to meet every charge and did in fact do so.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: October 9, 1968.

Respectfully submitted,

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